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JAMES
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 596

MICHAEL STELLA, suing on his own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated,

Petitioner,

—against—

GRAHAM-PAIGE MOTORS CORPORATION and KAISER-FRAZER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Michael Stella, a stockholder of Kaiser-Frazer Corporation, acting on behalf of himself and other stockholders of said corporation, respectfully prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on September 26, 1958, affirming the judgment of the United States District Court dismissing his complaint.

Opinions Below

This case has been twice appealed.

The opinion of the District Court on the prior appeal dismissing the complaint is reported at 132 F. Supp. 100, and appears in appellant's appendix on such appeal (cited as a) at 39a-62a. The opinion of the Court of Appeals reversing that dismissal is reported at 232 F. 2d 299; it appears in appellant's supplemental appendix in the Court of Appeals (cited as s. a) at 49 s. a-59 s. a. This Court denied certiorari, 352 U. S. 831.*

The opinion of the District Court on the instant appeal, again dismissing the complaint, is reported at 149 F. Supp. 390 and appears at 60 s. a-71 s. a. The opinion of the Court of Appeals affirming this dismissal is reported at 259 F. 2d 476** and is appended to this petition at pp. A-3—A-17, *infra*.

Grounds of Jurisdiction

The opinion and judgment of the Court of Appeals are dated September 26, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

* The appendix on the first appeal was certified to this Court as part of the record in support of the petition for certiorari which was filed by our adversary. Petitioner requests that the record as then certified, including such appendix, be considered as part of the record in support of this petition.

** This opinion, as printed in the Advance Sheets for November 24, 1958, omits to state that Waterman, J., concurred only in the result.

Questions Presented

1. A corporation, by its representations to the Securities and Exchange Commission and the Bureau of Internal Revenue, induces them to make rulings and take action favorable to its objectives. The representations, if untrue, violate important federal policies. In a subsequent litigation not involving SEC or Internal Revenue the corporation defends upon claims and contentions directly contrary to its prior representations to these agencies. Is the corporation barred from so defending under the federal doctrine of estoppel based not upon reliance but on precluding a party from repudiating representations made by it, which, if untrue, violated important federal policy?*

2. Under the rule laid down by this Court that, in order to determine the market value of property for which there is no market, the trier must look to the price which would have been paid in cash by a hypothetical willing buyer to a hypothetical willing seller,** is it permissible to take instead, as market value, the special value of the property to a purchaser so uniquely situated that he was willing to pay a price far beyond what anybody else would pay?

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* *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Lewis* v. *Atlas Corp.*, 3 Cir., 158 F. 2d 599, 602.

** *United States* v. *Toronto Navigation Co.*, 338 U. S. 396, 402; *United States* v. *Miller*, 317 U. S. 369, 374, both cited by the Court of Appeals in its first opinion herein, 53 s. a. fn. 3.

Statute Involved and Basis of Federal Jurisdiction

This case arises under Section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. 78p (b),* which provides that profits realized from "inside trading" within a six months' period may be recovered by the corporation whose stock is traded, and federal jurisdiction is conferred by Section 27 of that Act, 15 U. S. C. 78aa. However, neither of the questions presented turns upon the construction of that Act. The questions presented relate to the above stated federal doctrine of estoppel and federal rule of property valuation.

Statement

At the times in suit, Graham-Paige Motors Corporation (hereinafter GP) and Kaiser-Frazer Corporation (hereinafter KF) were engaged in a joint operation for the manufacture of automobiles in a

* "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; * * *"

plant leased by KF from Reconstruction Finance Corporation at Willow Run, Michigan (Plaintiff's Finding of Fact 5,* 3 a). In February, 1947, KF bought GP's interest. As a part of the transaction GP acquired 750,000 shares of KF stock. In August, 1947, and within a period of less than six months, GP sold 155,000 shares of such stock (50 s. a). As the Court below held, *ibid.*, GP was an insider under Section 16(b), *supra*, being the beneficial owner of more than 10% of KF's stock. Petitioner brought this action pursuant to Section 16(b), as a stockholder of KF, to recover for KF from GP the profits which GP made on such purchase and sale.

In the proceedings below it has been finally further adjudicated (1) that KF is entitled to recover such profits, if there were any, and (2) that petitioner made a *prima facie* case from GP's books and records, and its representations to, among others, SEC and Internal Revenue, that GP profited in the amount claimed by Petitioner;** that therefore GP, as a fiduciary guilty of self-dealing, has the burden of proving with certainty to what extent its profits were less than such amount; "and that consequently, if the fiduciary's proof leaves the amount uncertain, judgment goes against him for the maximum figure" (52 s. a-53 s. a).

The 155,000 shares were sold by GP for $6.75 per share in cash. However, the stock was acquired by

* These Findings of Fact are hereinafter designated "Pff. F. F."

** These books, records, and representations show that the value of the property exchanged for the 750,000 shares of KF stock, hence the cost of such stock, was only $3.94 per share, and that the sale of the 155,000 shares at $6.75 per share resulted in a profit of $2.81 per share, or a total of $434,787.86 (*infra*, pp. 13-14).

GP in exchange for property transferred by it to KF in the transaction referred to. Accordingly, as all agree, the cost of the stock had to be established by ascertaining the fair market value of the property exchanged therefor. The Court below rejected petitioner's contention that GP is estopped to claim that it did not profit as, and in the amount, established by its own representations to SEC and Internal Revenue; and it further held that GP in fact made no profit on the sale of the 155,000 shares; but reached the latter result only by fixing the fair market value of the property, not on the basis of what a willing buyer would pay a willing seller, but on the basis of the special value of the property to the purchaser, KF. Petitioner contends that in both respects the decision below is in conflict with the decisions of this Court; that on the point of estoppel the decision below is also in conflict with a decision of the Third Circuit; and that on the point of valuation the decision below presents an "intracircuit conflict,"* since the Court has in effect repudiated the prior decision of a different bench on the first appeal.

In what follows we shall set forth only those facts which are necessary to place these issues in their proper setting. All of them were found by the District Court or are undisputed.

Circumstances of the Transaction

The pertinent features of the joint manufacturing operation were these:

The cars to be manufactured were the "Frazer", manufactured for account of GP, and the "Kaiser

* *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 508; *cf. Mazzeo* v. *Zeitz*, 333 U. S. 56, 59.

Special" for account of KF. The cars had the same motor and chassis, and were identical up to a certain point in the assembly line; thereafter the "Frazer" was given a more expensive finish, trim, and upholstery, and sold for a higher price (Pff. F. F. 8, 4a).

The machinery and equipment were owned in undivided two-thirds by KF and one-third by GP. KF was entitled to two-thirds, GP to one-third, of the productive capacity of the plant. KF and GP were to share in those proportions in all capital costs, make-ready costs, and operating expenses (Pff. F. F. 10, 5a; Pff. F. F. 7, 4a). KF was entitled to use the design of the Frazer automobile (Pff. F. F. 123, 22a). With negligible exceptions, the same dealers and distributors sold the two cars for account of the respective companies (Pff. F. F. 128, 23a).

From the outset this arrangement presented substantial operating difficulties. In addition, GP became financially embarrassed and was without funds or credit to continue financing its one-third of the production, including further necessary capital costs (Pff. F. F. 15, 5a). If GP went into bankruptcy or other receivership intolerable operating difficulties would arise for KF; and KF, also, would be in danger of bankruptcy (Pff. F. F. 109(a), 18a). On the other hand, GP's one-third interest in the operation and equipment was substantially unsaleable to any outsider; much of the machinery and equipment was special-purpose, useful only for the manufacture of these particular cars; and any purchaser other than KF of GP's one-third interest would inherit the unworkable joint arrangement (Pff. F. F. 91, 16a; Pff. F. F. 95, 17a; 21 s. a-22 s. a; 26 s. a-27 s. a).

Thereupon, the parties agreed that the thing to do was for KF to acquire GP's interest, if a feasible plan could be worked out (Pff. F. F. 15, 5a).

Acquisition by GP of the 750,000 Shares

The plan adopted by the parties was to transfer to KF sole ownership of this venture and turn GP from owner of an undivided one-third into a stockholder of KF, GP retaining its non-automotive assets and equipment and continuing in its non-automotive business.

Pursuant to the plan GP transferred to KF the former's "automotive assets", i. e., its one-third interest in the machinery, tools, material and inventory, together with certain net current assets, including $4,000,000 in round figures in cash, and also specified "deferred assets" (deferred costs of advertising, design, etc.); in consideration of which KF agreed to pay GP an amount equal to the principal and interest as it accrued upon $8,524,000 of GP's debentures then outstanding, and issued to GP 750,000 shares of KF stock. KF remained undisturbed in its right to use the design of the Frazer automobile. KF's automotive products would be sold through the dealer and distributor organization theretofore established for account of both companies.

The undisputed testimony of those who handled the transaction was that KF paid more for the assets transferred than any other purchaser, actual or hypothetical, would have paid (32 s. a-33 s. a); because KF by purchasing was ending an unfavorable operating situation and eliminating the risk of bankruptcy, whereas any other purchaser would have inherited these difficulties and dangers (Pff. F. F. 109(a).

109(b), 18a; 27 s. a-28 s. a; 32 s. a-33 s. a). Under the circumstances KF was the only possible purchaser, and the only purchaser considered (21 s. a-22 s. a; Pff. F. F. 95, 17a; Pff. F. F. 125, 22a).

Facts as to Estoppel

GP, in statements to SEC, the Bureau of Internal Revenue, the New York Stock Exchange, its own security holders, and the investing public generally, consistently represented before suit that the cost of the KF stock and the value of the assets transferred therefor was $3.94 per share and that its profit from the sale of the 155,000 shares was the amount in suit, $434,787.86, as follows:

1. *GP's Booking and Explanation of the Cost of the KF Stock*

GP first entered upon its books the figure of $3,076,083.09 as representing the cost of the KF shares (Pff. Ex. 18a, p. A-2, *infra*). Before the books were closed for 1947, GP adjusted downward to $2,958,686.20, or $3.94 per share, the cost of such shares, by reason of adjustments in the book value of assets transferred therefor (Pff. F. F. 98, 17a). GP's cost of the stock still remained at this figure on its corporate books and records when the case was tried in 1949, and there is no showing that it has been changed even now. No claim is made that such cost figure was entered by reason of mistake or inadvertence; on the contrary, as will shortly be shown, pp. 11-16, *infra*, it was entered upon careful deliberation and was successfully justified by GP to SEC and Internal Revenue at the time.

GP's computation of such cost, showing also how the $3.94 figure was arrived at, viz., by recording the assets transferred at book value (depreciated cost) and deducting the obligation that KF undertook, appears as follows in the company's 1947 Annual Report and in an identical statement filed with SEC on Form 10-K pursuant to the requirements of the Securities and Exchange Act of 1934 (45 s. a. 47 s. a):

"Assets transferred:

Net current assets (including $4,170,077.82 cash)	$ 4,295,302.48
Investment in and advances to Kaiser & Frazer Parts Corporation (less reserve)	268,005.17
Fixed assets (net)	6,181,723.94
Deferred assets—advertising design, development, and engineering costs, etc.	737,654.61
Total	$11,482,686.20
Deduct—4% convertible debentures due April 1, 1956 (principal amount), to be paid by Kaiser-Frazer Corporation	$ 8,524,000.00
Value assigned to 750,000 shares of Kaiser-Frazer Corporation common stock received by Graham-Paige Motors Corporation	2,958,686.20"

No issue is presented in this petition as to the above asset items. The questions presented relate to alleged additional automotive assets, in the nature of "intangibles", claimed to have been transferred to KF, which intangibles were nowhere, before suit was instituted in 1949, valued, or reflected as having value, in any of GP's recordings and representations of the transaction. It was on the basis of the special value to KF of these additional "intangibles" (pp. 16-17, *infra*) that the Court below has concluded that the cost of the shares to GP was not $2,958,686.10, or $3.94 a share, as at all times before suit recorded and represented by GP, but, instead, over $6.75 per share and possibly as much as $6,000,000, or $8.00 a share.

2. *GP's Representations to SEC, its Stockholders, and the Investing Public*

In order to clear with SEC its proxy statement in which it solicited stockholder approval for the transaction, GP represented to SEC that the fair value of the assets transferred did not exceed the book value (depreciated cost) as summarized *supra*, p. 10. This came about as follows:

Since GP's stock was registered on the New York Stock Exchange, its proxy statement soliciting stockholder approval for the transaction had to be cleared with SEC, and was of course subject to the prohibition in the SEC rules against false or misleading statements (Securities Exchange Act of 1934, Sec. 14, and Rules X-14-A-6 and 14-A-9 thereunder, printed at p. A-1, *infra*). Preliminary copies forwarded to SEC for scrutiny contained no statement as to the value of the automotive assets to be transferred or the

considerations to be received from KF in payment therefor (Pff. F. F. 77, 14a). SEC advised GP that the statement was defective in failing to give stockholders

> "some clear conception, *dollarwise*, as of recent date (furnishing reliable estimates where necessary) of the assets Graham-Paige is selling and transferring to Kaiser-Frazer and the value of the consideration Graham-Paige is receiving (Kaiser-Frazer stock and liabilities assumed) in return for such sale and transfer. * * *" (Emphasis ours.) (38 s. a).

In compliance with this requirement, GP added to its proxy statement a statement that the assets to be transferred consisted of (40 s. a-41 s. a):

> "(a) tangible automotive assets of an approximate value of $6,500,000;* (b) approximately $4,250,000 in cash; and (c) accounts receivable (other than trade accounts receivable) amounting to approximately $163,000. * * * For a more detailed statement of the property being transferred by Graham-Paige and the consideration being paid therefor by Kaiser-Frazer, reference is made to page 22 of Exhibit E hereto * * *."

* It is obvious that this figure was obtained by adding up the book values (depreciated cost) of the following assets; *supra*, p. 10:

Fixed assets	$6,181,723.94
Investment in and advances to Kaiser-Frazer Parts Corporation (less reserve	268,005.17
	$6,449,729.01

A reference to Paragraph (c) of page 3 of Exhibit E to the proxy statement, 42 s. a, shows that the "intangible rights" referred to consisted of the above mentioned deferred design, development, engineering and advertising costs, with assigned value of $900,851.24 (later reduced to $737,654.61, *supra*, p. 10, and Pff. F. F. 98, 17a). There was in the proxy statement no enumeration of, or indication of values assigned to, other intangibles of any kind.

With this addition, and under persuasion by GP's counsel that no value could properly be assigned to the additional intangibles now in suit,* SEC cleared the proxy statement and it went out to GP's stockholders who thereupon approved the transaction.

The following further filings and representations made by GP were uniformly consistent with the figures and explanations in the proxy statement and inconsistent with GP's present position:

On November 13, 1947, GP filed with SEC pursuant to the Securities Act of 1933 a registration statement and prospectus covering the sale of further common shares (Pff. F. F. 85, 15a), setting out

* Jennings, counsel for GP, testified that he drafted and approved the proxy statement. He discussed with the SEC staff the matter of valuing the assets transferred and what value, if any, should be assigned to the intangibles. Jennings considered that under the circumstances any understatement of value in failing to assign a dollar value to GP's intangibles, in excess of the figure assigned to the deferred costs hereinbefore referred to, would not be material. Among the facts leading to his conclusion was a realization that the GP stockholders had no choice; if they did not approve the sale they would be wiped out; and there was no purchaser except KF (Pff. F. F. 82, 83, 15a). The SEC staff was persuaded by Jennings' arguments (Pff. F. F. 84, 15a).

the same figures and explanations that appear in the proxy statement (37 s. a).

In GP's annual report to stockholders and to SEC for the year 1947, referred to at pp. 10, 11, *supra*, GP stated the profit realized from the sale of 155,000 shares of stock as $434,787.86 (44 s. a, 47 s. a Note). This profit was shown to be based on the cost of the KF stock which was derived from the book value of the automotive assets as above explained (47 s. a). It reported no profit on the original exchange of automotive assets for the 750,000 shares of KF stock.

3. *GP's Representations to the Bureau of Internal Revenue*

GP, as shown above, pp. 9-10, and summarized at 45 s. a-46 s. a, gave, for 750,000 shares of KF stock, assets which had a depreciated cost of $2,958,313.90, or $3.94 per share of such stock. GP then sold 155,000 shares of such stock for cash, at $6.75 per share. It is obvious, and was admitted by GP's accounting witness (1 s. a, 2 s. a), that a taxable profit was made either on the initial exchange of the assets for stock or upon the subsequent sale of stock for cash, or partly in both transactions. Had the entire 750,000 shares of stock been sold in 1947 for $6.75 per share, it would have made no difference where GP allocated the taxable profit. However, since only 155,000 shares were sold in 1947, it is obvious that, by claiming that there was no profit on the sale of the assets for stock and allocating the entire profit to the sale of stock for cash, GP would be taxed for 1947 on only 155/750ths, or approximately one-fifth, of the entire

profit, the tax on the balance of the profit being deferred, perhaps indefinitely.

In reporting the two transactions in its 1947 tax return GP did just that. It took the position that it had realized no profit on the exchange of assets for stock, but that its entire profit had been realized on the sale of the stock for cash. 3 s. a. On this basis it computed its taxable profit at only $417,767.53.* Had GP taken with the Internal Revenue the position which it has successfully sustained below, that it had exchanged assets which cost it $2,958,313.90 for KF stock which might be worth as much as $6,000,000 (p. A-11, *infra*), it would have necessarily reported a taxable gain of $3,041,686.10—the difference between the two figures—instead of the lesser amount which it did report.

GP was aware of the effect of what it was doing. In its proxy statement (Note C, 43 s. a) GP stated:

> "Should it be determined that such shares have a higher value for Federal income tax purposes than the recorded value [$2,958,313.90 as subsequently adjusted] there would be taxable income in the amount of such excess which would be taxable at 25% under present law."

GP's accountant testified that it took its position deliberately, in order to avoid the larger taxable profit; and that upon the audit GP was successful in getting

* The tax return contains a reconciliation of the taxable profit of $417,767.53 with the profit reported to the stockholders of $434,767.63; the difference evidently being based upon minor differences in the carrying cost of assets transferred for tax purposes and for general bookkeeping purposes (48 s. a).

the taxing authorities to accept this position, 3 s. a, 4 s. a.*

Thus, by successfully making the above representations to the Federal taxing authorities (which representations, under the holding below, were contrary to fact) GP reported in 1947 only one-fifth of the profit which, as held below, it actually realized on the exchange of its assets for KF stock; and it conserved the greatest part of its operating loss unimpaired, as a carry forward for more profitable years.

Proof as to the Value of the Additional Intangibles

There was no proof, in terms of the willing-seller-willing-buyer rule, of the value of these intangibles. GP's only witnesses as to value admittedly did not testify in such terms (21 s. a, and 24 s. a-25 s. a) and all the opinions below so recognize. The District Court after remand, and the second bench of the Court below, fixed the value of these intangibles, instead, on the basis of their special value to KF (pp. 21-22, *infra*; 65 s. a-68 s. a).

* He testified, admittedly on hearsay, that the tax authorities in accepting the reported figure were influenced by the fact that GP's losses were such that it would not have paid any tax in 1947, in any event. But even if this testimony is accepted, GP nonetheless realized a substantial tax benefit. GP, as already noted, retained its non-automotive assets and continued in its non-automotive business. The operating loss was therefore valuable to GP as a carry forward (Internal Revenue Code of 1939, Section 122, as amended by Act of October 21, 1942) against profits of later years, and conserving the greatest part of it, as GP did, was of substantial importance to the company.

The proof of the special value to KF consisted of the following:

In setting up the transaction, the parties decided that, in addition to KF assuming the $8,524,000 obligation, it would be proper to issue to GP the 750,000 shares of KF stock. The KF directors, following routine corporate procedure, adopted minutes to justify the issuance of this number of shares. They discounted the then market price of KF stock, $8.00 per share, to $6.50 per share as the net proceeds that KF would probably realize if it sold this large block in the market, totaling $4,875,000 (Pff. F. F. 113(a), 20a), which, added to the $8,524,000, gave a total of $13,399,000. But the tangible automotive assets actually comprised in the transaction (i. e., the assets transferred by GP without the additional intangibles now in question) were valued by the KF board at $10,639,579.45 (65 s. a), which was only $2,115,579.45 more than the $8,524,000 obligation assumed by KF (67 s. a). There was thus left a difference of $2,759,420.55* to be accounted for in order to cover the $4,875,000 fixed by the directors as the issuing value of the 750,000 shares; and this difference the KF directors allocated to intangible benefits (called by the KF directors "so-called intangible property", 68 s. a) that KF would get by entering into the transaction.

Concededly, such "so-called intangible property", if saleable at any price at all to a buyer other than KF, could have commanded no more than a nominal price (Pff. F. F. 95, 17a; 21 s. a-22 s. a; 26 s. a-27 s. a). Concededly, too, the $2,759,420.55 figure did not repre-

* By arithmetical mistake set forth as $2,957,420.55 in the second opinion of the District Court, at 65 s. a.

sent any valuation or appraisal of these intangibles (they were never in fact valued or appraised), but only a balancing figure (Pff. F. F. 115, 21a; 31 s. a.). But even assuming that it was anything more than a balancing figure, what it would reflect would be, of course, only the judgment of the KF directors of the peculiar value of these assets to KF, which, under corporate law, was a consideration they could properly take into account (*Gamble* v. *Queens County Water Company*, 123 N. Y. 91, 104, 105; research has disclosed no contrary rule in Nevada, the State of KF's incorporation); such peculiar value arising out of the fact that KF was buying itself out of an impossible operating situation. Accordingly, by no possible interpretation did the figure of $2,759,620.55 represent what a willing buyer would have paid for the intangibles; and the Court below so recognized (pp. 21-22, *infra*).

Proceedings Below and Intracircuit Conflict

First Decision of District Court and Decision on First Appeal

The first decision of the District Court (Dimock, J.) was reversed by a bench consisting of Judges Clark, Frank and Hincks (opinion by Judge Frank, with Judge Hincks dissenting on grounds not now relevant), 232 F. 2d 299, cert. den. 352 U. S. 831.

The reversal was grounded on two errors:

1. The District Court held that petitioner had made out a *prima facie* case from GP's own books, records and representations that the KF stock, which GP sold for $6.75 a share, had cost it $3.94 a share,

but he considered that GP's proof put the matter in doubt; "therefore", the first bench wrote, 52 s. a, "as defendant's proof left the judge uncertain in this respect he decided for defendant." This, the first bench held, 52 s. a-53 s. a, was error because

> "a 'beneficial owner' who buys and sells within the statutory period is to be regarded as a fiduciary who breaches his duty of loyalty, (i.e., his duty not to engage in self-dealing) and who in such circumstances, must account for his profits. Elsewhere we have held that, once a cestui shows a breach of such duty and prima facie proof of a maximum amount of profits made by the fiduciary, then the fiduciary has the burden of proving to what extent the profits were less than this maximum—especially where the fiduciary's breach is responsible for the difficulty or impossibility of proving the amount with certainty—and that consequently, if the fiduciary's proof leaves the amount uncertain, judgment goes against him for the maximum figure." [Citing cases.]

2. The District Court gave no weight to the undisputed fact, *supra*, p. 8, that no willing buyer would have paid as much for GP's assets as KF paid, or to petitioner's objection that GP's evidence did not relate to what a willing buyer would pay, but only to special value to KF. He wrote (54 a-55 a):

> "To meet Graham-Paige's evidence tending to show a substantial value for intangibles in the exchanged assets, plaintiff argues in his brief that this evidence did not relate to the market value of the intangibles, that is, the amount realizable upon

> sale to a 'willing buyer'. However in the same brief, a few pages later, plaintiff admits that under the conditions obtaining at the time of the purchase there was no market for Graham-Paige's automotive assets, tangible or intangible. . . . [P]laintiff having admitted, in fact asserted, that there was no 'market' for what defendant exchanged, the 'willing buyer' test is inapplicable. Courts cannot value assets for which there can be but one buyer by reference to what a hypothetical willing buyer would pay for them."

The first bench held this ruling, also, to be erroneous, saying, 53 s. a, fn. 3:

> "The judge ruled that, because there could be but one buyer of the Graham-Paige assets, the willing-seller—willing-buyer rule of fair market value was inapplicable. Perhaps we need not consider that ruling in view of the ground of our decision. But it may be well to say that we think this ruling erroneous. The willing-seller rule is not abrogated by the absence of a market; the trier of the facts must look to other relevant evidence of the price which a buyer would pay. See *United States* v. *Toronto Nav. Co.*, 338 U. S. 396, 402; *United States* v. *Miller*, 317 U. S. 369, 374-375; *De La Rama S. S. Co.* v. *United States*, 206 F. 2d 651, 655 (C. A. 2); *Westchester Park Comm.* v. *United States*, 143 F. 2d 688, 692 (C. A. 2)."

Accordingly, the first bench remanded with directions that the District Court make a specific finding on the question of GP's profit, if any, in the light of the above rulings (53 s. a).

Second Decision of the District Court

On remand, the parties stood on the record already made, so that there was again no proof of the value of the additional intangibles in terms of the willing-seller—willing-buyer rule. Notwithstanding this, the District Court (Dimock, J.) again held for the defendant, concluding—on the same proof that had left him uncertain theretofore—that the KF stock had cost GP not $3.94 but $11.08 a share (71 s. a). He did this by accepting the balancing figure of $2,759,420.55 which KF allocated on its books to the intangibles, and at the same time valuing at 50¢ on the dollar KF's obligation in the face amount of $8,524,000., 69 s. a. As the District Court recognized at the first trial, 17 s. a, this reasoning was inconsistent in assigning value to the intangibles on the theory that the business was going to prosper, but cutting in half the value of the KF obligation on the theory that the business was going to fail. The second bench did not accept this reasoning, but affirmed on different grounds:

Second Decision of the Court of Appeals

This appeal was decided by a different bench, Judges Lumbard, Waterman and Moore (opinion by Judge Moore, Judge Waterman concurring in the results only, pp. A-3–A-17, *infra*).

On the question of estoppel the first bench did not write. The second bench rejected the contention (pp. A-14–A-17, *infra*). This holding is discussed at pp. 23-27, *infra*.

On the question of valuation, the second bench in effect repudiated Judge Frank's opinion. Starting from the sound premise that "when stock is acquired for property, tangible and intangible, the cost of the stock should be computed upon the value or worth of the assets delivered in exchange" (p. A-9, *infra*), it valued these assets at the "special and unique value" which the uniquely circumstanced unwilling buyer, KF, paid on account of its necessities. It wrote (p. A-7, *infra*):

> "* * * At the threshold of the transaction the directors of KF had to determine the price to be paid for the GP assets. If KF, instead of issuing 750,000 shares of stock to GP, had paid $7,500,000 for the assets transferred because of the special and unique value which they had to KF, this dollar amount would have represented to KF and GP the value of the assets. * * *"

And, again (p. A-8, *infra*):

> "The fallacy of appellant's theory is well illustrated in his brief wherein he attacks appellees' witnesses because 'neither was testifying in terms of what a willing buyer dealing at arms length would pay for the intangibles' (p. 26). Naturally a willing buyer might willingly offer nothing for the intangibles. But would the seller be as willing to accept?"

And, again (p. A-9, *infra*):

> "Appellant * * * recognizes that 'The value of property which is to be fixed by a board of directors when the company issues stock for such property is the special value to the company'

(Applt's Br., p. 28). Having asserted a generally sound principle, appellant can only avoid it by falling back on his underlying misconception that special value 'is no evidence of what a willing buyer would pay' or 'of the price which would be paid by the hypothetical willing buyer.' (Applt's Br. 28, 29). * * *"

In other words, value, under the holding below, is not the figure at which there is a meeting of the minds of the willing buyer and willing seller, but the special value to the unwilling buyer, even one who is forced to buy on account of his necessities. This, petitioner submits, is contrary to the rule established by this Court, and the holding of the first bench on the prior appeal (pp. 28-30, *infra*).

REASONS WHY THE WRIT SHOULD BE GRANTED

I

The Court below, in holding that GP was not estopped by its inconsistent representations to SEC and the Bureau of Internal Revenue as to the cost of the KF shares and the value of the assets exchanged therefor, has decided an important question of federal law in a way in conflict with the decisions of this Court. The holding is also in conflict with the decision of another Court of Appeals on the same matter.

We rely, for probable conflict with the decisions of this Court, on *Deitrick* v. *Greaney*, 309 U. S. 190, and *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Co.*, 315 U. S. 447.

For conflict with another Court of Appeals on the same matter, we cite *Lewis v. Atlas Corp.*, 3 Cir., 158 F. 2d 599, 602.

The principle of federal law involved is preclusion of a party, in subsequent litigation, from repudiating representations made to U. S. regulatory and administrative agencies which, if untrue, violated important federal policy.

In *Deitrick v. Greaney*, 309 U. S. 190, the maker of a fictitious note to a national bank, which was intended to inflate the apparent assets of the bank, was held liable thereon. This Court held that it was not necessary that the personnel of the bank, or the bank examiners, or the creditors, be deceived (309 U. S. at pp. 197, 198). Recognizing that "in a strict and technical sense an estoppel arises only when a misrepresentation has prejudiced another who has relied on it", this Court held nevertheless that the necessity of upholding the policy of the Banking Act precluded the maker from pleading his own misrepresentation in defense.

The second bench distinguished *Deitrick* (p. A-16, *infra*) on the ground that, as stated by this Court, the doctrine involved therein could not be called estoppel in its "strict and technical sense". In so doing the Court below missed the essential point of that decision, which is, that one who misstates a material fact where federal policy exacts integrity of statement is held to his misstatement even as against those who neither relied on it nor were injured by it. Whether this result is called "estoppel" or something else is quite immaterial.

D'Oench, Duhme & Co. v. Federal Deposit Ins. Co., 315 U. S. 447, broadly extended the *Deitrick* doctrine to an act in violation of the policy of a federal statute protecting the FDIC which was adopted after the act in question was committed, and where no damage to FDIC was shown to have resulted from that act. Accordingly, it is here *a fortiori* authority. In *D'Oench* Justice Jackson, concurring in the holding that the defendant was precluded from the attempted defense, wrote, referring to *Deitrick*, "I think we now may borrow a doctrine of estoppel from the same source from which the Court borrowed it in that case, and to reach the same result" (315 U. S. 475).

In short, the question is not, as the Court below apparently thought, what label is to be attached to the doctrine of *Deitrick* and *D'Oench*. The essential question is whether the federal policy of exacting integrity of representations made to SEC, the investing public, and Internal Revenue, is less compelling than the federal policy concerning the Banking Act and FDIC, involved in the above decisions of this Court.

Limiting ourselves to the proxy statement alone, and disregarding for the moment the systematic and persistent use that GP made of the figures and explanations contained therein *vis-a-vis* Internal Revenue and others (pp. 14-15, *supra*), we have this situation:

GP persuaded SEC to clear its proxy statement on the representations (1) that the only intangibles having value, which GP was selling and transferring to KF, were deferred costs of $900,851.24 (later adjusted to $737,654.61, p. 10, *supra*), and (2) that GP was getting

for the assets a KF obligation in the sum of $8,524,000, and 750,000 shares of KF stock at a cost of $3.94 per share. Now, however, it has been held that GP may defend against liability for self-dealing as an insider by proving that both these representations were untrue,* and to do so by recourse to facts which of course existed, and were known to GP to exist, when it made these representations. The intangibles being sold and transferred, it is now held, were quite different from those stated to SEC, and had a value, not of $900,000 or $737,000, but of millions; and the stock that GP was getting, it is now held, was costing it not $3.94 a share, but upward of $6.75.

Our submission is that this violates what has been held by this Court in *Deitrick* and *O'Donch*.

This holding is also, we think, directly in conflict with the holding of the Third Circuit in *Lewis* v. *Atlas Corp.*, 158 F. 2d 599, 602.

In that case a suit by the buyer for breach of a contract for sale of debentures was defended on the ground that the contract had terminated because not approved by SEC by August, 1940. A writing agreeing upon such termination had been executed by the parties, but only, according to plaintiff, "as window dressing" for SEC. At a hearing before the SEC trial examiner, counsel for plaintiff told him that August 19 was the agreed termination date if SEC had not approved by then. The Court held that, by reason of the above, plaintiff was

* And deliberately so; see Jennings testimony, p. 13, *supra*, fn

estopped from claiming that the contract had not terminated on August 19. The Court said (p. 602):

> "Plaintiff can hardly be in a position of asserting the existence of an agreement [to carry out or terminate a contract by a stated date] before a public regulatory body and denying it before a court."

In our case the Court below held that *Lewis* did not apply, because in *Lewis* "the prior inconsistent position was made to a SEC examiner in the course of a hearing, i.e., a quasi-judicial proceeding," whereas in our case the prior inconsistent statements "were not made in any type of judicial proceeding" (p. A-16, *infra*). Here again, we think, the Court below has missed the essential point. The Court's action in disregarding *Lewis* because it could not perfectly equate GP's conduct with judicial estoppel, where reliance is not necessary,* is like its disregard of *Deitrick* because this Court recognized in that case that it was laying down a doctrine that is not estoppel in its "strict and technical sense."

The representations made on paper and repeated in conference by Jennings (*supra*, p. 13) were intended to induce, and did induce, representatives of SEC not to object to the proxy statement, and to permit its issuance. Much of the work of SEC is done in conference and leads only to negative action, i.e., failure to object by the Commission. No reason

* Such estoppel does not require reliance by, or detriment to, a party to the present litigation. Beck, "Estoppel against Inconsistent Positions in Judicial Proceedings" IX Brooklyn Law Review 245, 248; *Chandler* v. *McKerral*, 7 Cir., 68 F. 2d 343; *Shingleton* v. *Armour Boulevard Corp.*, 8 Cir., 96 F. 2d 473; *Starbuck* v. *Starbuck*, 173 N. Y. 503, 509.

is shown why a misleading statement to a staff member to whom the Commission has delegated the duty of hearing and reporting the proof should result in preclusion or estoppel, but a misleading statement to staff members in order to get clearance for a proxy statement should not.

Lewis and the decision below are, we think, directly in conflict with each other on this matter.

II

The Court below has decided an important federal question of property valuation in a way which conflicts with applicable decisions of this Court and with prior decisions of the same court, including the decision by a different bench on the first appeal herein.

The standards for valuing property in federal condemnation and requisition cases have occupied this Court and the lower federal courts on numerous occasions. What has been held herein by the Court below is applicable not only to such cases, but also in a variety of other important contexts—e.g., reorganization and bankruptcy proceedings, and indeed, wherever value is in issue as a federal question.

Judge Frank's opinion on the first appeal, *supra*, p. 20, from which the second bench departed, expressed settled principles of federal valuation law as established in such cases. He wrote, in conformity with the established rule, that the willing-seller—willing-buyer rule "is not abrogated by the absence

of a market; the trier of the facts must look to other relevant evidence of the price which a buyer would pay." The cases cited by Judge Frank from this Court and the Second Circuit teach the following:

1. Market value is the price at which a willing seller will sell and a willing buyer will buy. *United States* v. *Toronto H. & B. N. Co.*, 338 U. S. 396, 402; *United States* v. *Miller*, 337 U. S. 369, 374; *Westchester County Park Comm.* v. *United States*, 2 Cir. 143 F. 2d 688, 692. A willing seller is "one not forced to sell"; a willing buyer is "one not forced to buy" (*Westchester, supra*, p. 692). The willing seller and willing buyer are hypothetical figures who need not exist in fact. *Toronto, supra*, 338 U. S. at p. 402; *Westchester, supra*, 143 F. 2d at p. 692.

2. When no market exists in fact, market value may be proved by any relevant circumstances which might fairly be advanced and given weight by the hypothetical willing buyer and seller. *United States* v. *Miller*, 317 U. S. 369, 374; *cf. Olson* v. *United States*, 292 U. S. 246, 257. Relevant factors usually taken into consideration are enumerated in *Toronto, supra*, 338 U. S. at pp. 398-406. But all such evidentiary matters are relevant "only of course as bearing on what a prospective purchaser would have paid." *Toronto, supra*, 338 U. S. at p. 402.

3. The above cases dismiss as irrelevant all considerations of unique value to the actual buyer or seller (*Westchester, supra*, 143 F. 2d at p. 693) and the actual attitude of these persons. "The question is what an ordinary businessman in the trade would do, not what the owner claims he would do; a con-

trary rule would invite perjury and would smack of the kind of special value which would not be considered by the ordinary purchaser." *Toronto, supra*, 338 U. S. at p. 406.

Judge Moore, speaking for the second bench, and without citation of authority, fixed the value of the property transferred by GP not on the basis of what a willing buyer would pay a willing seller, but, instead, on the basis of "the special and unique value" of the property to the uniquely situated *unwilling* buyer KF, even though it was undisputed that no other buyer, actual or hypothetical, would be willing to pay such a price. Under that rule, sub-marginal farm land condemned for an atomic energy installation would have to be valued at its value, not to the farmer but to the condemnor. In the condemnation cases this would reverse the settled rule of just compensation expressed in Justice Holmes' oft-quoted statement that "the question is what has the owner lost, not what has the taker gained." (*Boston Chamber of Commerce* v. *City of Boston*, 217 U. S. 189, 195).

The holdings of the two benches are irreconcilable. The second holding, in addition to presenting conflict with the applicable decisions of this Court, also presents an "intracircuit conflict"* with the decision of the first bench herein and the prior decisions in the Second Circuit upon which the decision of the first bench was rested.

* *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 508; *cf. Maggio* v. *Zeitz*, 333 U. S. 56, 59.

Conclusion

The Court below, in its rejection of *Lewis* v. *Atlas Corp.* as authority supporting estoppel, said the following, which throws light on both of the questions—estoppel and valuation—presented by this petition (p. A-16, *infra*):

> "* * * The statements here sought to be set up as estoppels [were not made in any type of judicial proceeding but] were made in the regular course of business. The figures were reached as results of negotiations conducted by GP with the SEC and the Revenue Service with the explicit realization by all concerned that the true cost of the shares was impossible to evaluate. Thus these opinions did not purport to be statements of demonstrable facts within the knowledge of GP * * *. A party who is forced in the course of his business for practical reasons to make an estimate or to venture a guess is not forever precluded from reversing his estimate."

The holding that GP is not estopped by its prior representations as to the cost of the stock, because they were of necessity only "a guess" and not "statements of demonstrable facts within the knowledge of GP," but that GP has now proved such cost by facts which existed, and were known to GP to exist, when it made these prior representations, comprises two wholly contradictory conclusions. In order to arrive at them the Court below, we submit, has proceeded contrary to federal law both as to estoppel and valuation.

PRAYER

For the foregoing reasons, Petitioner prays that this petition be granted, to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed; and that Petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

MICHAEL STELLA

By LEWIS M. DABNEY, JR.
MURRAY C. BERNAYS
Counsel for the Above Petitioner

Relevant Statute and S. E. C. Rules

Sec. 14(a), Securities Exchange Act of 1934, 15 U. S. C. 78n(a).

It shall be unlawful for any person, by the use of the mails or any means or instrumentality of interstate commerce or any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect to any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule X-14A-6.

(a) Three preliminary copies of the proxy statement and form of proxy and any other soliciting material to be furnished to security holders concurrently therewith shall be filed with the Commission at least ten days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period prior to such date as the Commission may authorize upon a showing of good cause therefor.

* * * *

Rule X-14A-9.

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it was made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading * * *.

Pertinent Portion of Plaintiff's Exhibit 18-A

Date July 31, 1947

GRAHAM-PAIGE MOTORS CORPORATION

JOURNAL VOUCHER

Explanation	General Ledger Acc't	Debit	Credit
Investment in Capital Stock in Kaiser Frazer Corporation	205211	3 076 083 09	
Sale Account—Automotive Kaiser Frazer Corporation	221148		3 076 083 09
To transfer the Cost of 750,000 shares of Kaiser Frazer Common Stock resulting the sale of all automotive assets and liabilities under the terms of the Sale agreement dated December 12, 1946 between Graham Paige Corporation and Kaiser Frazer Corporation.			

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 190—October Term, 1957.

(Argued March 4, 1958 Decided September 26, 1958.)

Docket No. 24655

MICHAEL STELLA, suing on his own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated,

Plaintiff-Appellant,

—v.—

GRAHAM-PAIGE MOTORS CORPORATION and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Before:

LUMBARD, WATERMAN and MOORE,
Circuit Judges.

Appeal from the United States District Court, Southern District of New York; Edward J. Dimock, *Judge.*

Plaintiff, Michael Stella, suing on his own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated appeals from

a judgment dismissing the complaint against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation on the merits in an action seeking to recover short-swing profits allegedly made by Graham-Paige Motors Corporation as a result of its sale of Kaiser-Frazer stock within a period of six months after its acquisition (section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A. section 78p(b)). Reported below at 149 F. Supp. 390.

Affirmed.

LEWIS M. DABNEY, JR., Esq., New York, N. Y. (Murray C. Bernays, Esq., New York, N. Y. on the brief), for Plaintiff-Appellant.

WM. FRANCIS CORSON, Esq., New York, N. Y. (Garey & Garey, Ambrose V. McCall, Sol Irving Sokolsky, New York, N. Y., on the brief), for Defendants-Appellees.

MOORE, *Circuit Judge*:

The plaintiff (appellant) brought this derivative action as a stockholder of Kaiser-Frazer Corporation (referred to as "KF") to reclaim for KF from the defendant Graham-Paige Motors Corporation (referred to as "GP") profits allegedly received by GP on the sale of 155,000 shares of KF stock within six months after their purchase by GP. The action is based upon the theory that under section 16(b) of the Securities Exchange Act of 1934 (48 Stat. 896, 15 U. S. C. A. section 78p(b)), the seller (KF) may recover any profit made by the purchaser (GP), a so-called "insider," in the event the stock was sold after having been held less than six months. GP's

position as an insider has been established upon a previous appeal (2 Cir., 1956, 232 F. 2d 299, cert. den. 352 U. S. 831).

Upon the first trial the district court found that plaintiff had failed to sustain his burden of proving that profits had been realized and, therefore, decided in favor of GP (132 F. Supp. 100). This court (232 F. 2d 299), holding that GP and not plaintiff had the burden of proof of showing that the profits on the sale were less than the $434,787.86 reported by GP in its income tax return, remanded with directions that the trial court make specific findings as to whether GP had made any profits and, if so, to what extent. The parties submitted the case to the same trial court on the original record which the district court reconsidered to determine whether GP in fact had sustained the burden of proving that it had not profited. The trial court found that instead of a profit GP had actually suffered a loss of $671,150 on its sale of the 155,000 shares of KF stock (149 F. Supp. 390). Plaintiff again appeals, complaining primarily that the trial court did not follow the opinion of this court on the previous appeal.

The facts are set forth in such detail in the previous opinions that they need not be repeated except as necessary to clarify the points now presented.

In late 1945, after World War II, KF and GP were engaged in the manufacture of automobiles. They shared a plant at Willow Run, Michigan. KF was a new company in the field but GP had some 146 distributors and 3,564 dealers obtained as a result of substantial expenditures. The joint operation proved to be unsuccessful and the management of both companies sought a solution of their problems. Discussions ensued between the officers, accountants and

counsel for the two companies and a plan was evolved whereby the tangible and intangible assets of GP were to be transferred to KF in exchange for the issuance to GP by KF of 750,000 shares of KF stock and an undertaking by KF to pay to GP an amount equal to the principal of, and interest on, $8,524,000 face amount of GP's 4% convertible debentures due April 1956. The assets transferred by GP to KF consisted of a substantial amount of cash and assets tangible and intangible. Because they proposed to issue stock for the acquisition, the number of shares to be given had to be fixed in relation to some dollar value. At the time of the negotiations the KF stock was selling at approximately $8 per share in the market. Market value, absent any manipulation or artificialty (and there is no proof of such a situation here), usually represents the collective judgment of the financial and investing community of the value of the property.

KF approached the valuation problem from the point of view of the net proceeds of a sale to the public of 750,000 shares of stock in the light of the then market price of $8 per share and concluded that not more than $6.50 a share or $4,875,000 would be realized from such a public offering. Accordingly, the KF directors decided that they would buy all of GP's automotive assets, accounts receivable, $3,000,000 in cash and $1,250,000 subject to adjustment in exchange for KF's undertaking to pay to GP an amount equal to GP's outstanding 4% debentures ($8,524,000), the issuance of 750,000 shares of KF's common stock and KF's assumption of GP's automobile business at Willow Run.

The transaction was consummated. Less than six months after GP had acquired the 750,000 KF shares it sold 155,000 of these shares for $6.75 a share. On

its Federal income tax return GP reported a cost of $3.94 a share for the stock and a profit of $2.81 a share or a total profit of $434,787.86 on the 155,000 shares. It is this profit which plaintiff seeks to recover for KF.

Two principal questions must be resolved: (1) did GP actually realize a profit on the sale; and (2) having declared a profit on its income tax return and in its S. E. C. proxy statement, is GP estopped from asserting otherwise in this case.

In view of this court's opinion the trial court was under a duty to re-examine the facts to determine whether GP had met its burden of proof that it had not made an actual profit upon the stock sale.

Many factors enter into value. The weight to be given to these factors involves the business judgment of the bargaining parties. In the absence of fraud or self-interest, the judgments of corporate directors representing KF and GP are not lightly to be disregarded. At the threshold of the transaction the directors of KF had to determine the price to be paid for the GP assets. If KF, instead of issuing 750,000 shares of stock to GP, had paid $7,500,000 for the assets transferred because of the special and unique value which they had to KF, this dollar amount would have represented to KF and GP the value of the assets. A purchaser of scrap or a dealer in second-hand machinery might only have paid $500,000 for these assets as scrap metal or second-hand machinery and, not being an automobile manufacturer, paid nothing for the investment in name and dealer organization. But such a purchase offer under such circumstances would not be relevant. In fact, any assumption of a sale of this type would violate the fundamental concepts of proper valuation. The fair value

of large industrial properties cannot be fixed by the estimated price which might be received on the auction block in liquidation. The best price would undoubtedly be offered by some company which had the greatest need for the property being sold. Only when such a purchaser were found would the seller obtain the optimum value. It is meaningless to talk in terms of a "willing seller-willing buyer" rule upon which appellant seems to found his principal argument unless there be a realistic and common sense approach to the rule. Obviously no seller is going to become "willing" until he finds the buyer who will pay the best price because of his belief that these particular assets will be peculiarly beneficial to him.

The fallacy of appellant's theory is well illustrated in his brief wherein he attacks appellees' witnesses because "neither was testifying in terms of what a willing buyer dealing at arms length would pay for the intangibles" (p. 26). Naturally a willing buyer might willingly offer nothing for the intangibles. But would the seller be as willing to accept?

In the same unrealistic vein, appellant would calculate the value of GP's property on the hypothesis that it "was unsaleable to an outside purchaser for any more than scrap value" and that a substantial part of the machinery "would have only scrap value to a purchaser not interested in securing such parts" (Applt.'s Br., p. 25). Such assumptions are neither relevant nor helpful as guides to a correct valuation. GP was not driven to sell its machinery to junk dealers or to discard its car designs and its dealer organization built up at great expense. KF recognized that there was value in these and other intangibles and issued its stock accordingly.

Appellant, as a stockholder of KF is, in effect, challenging the judgment of his own officers and directors and is endeavoring to substitute his hindsight judgment for their business judgment exercised at a critical period in the corporate lives of both KF and GP. Nevertheless, he recognizes that "The value of property which is to be fixed by a board of directors when the company issues stock for such property is the special value to the company" (Applt.'s Br., p. 28). Having asserted a generally sound principle, appellant can only avoid it by falling back on his underlying misconception that special value "is no evidence of what a willing buyer would pay" or "of the price which would be paid by the hypothetical willing buyer" (Applt.'s Br., pp. 28, 29). Again appellant completely ignores the fact that a "willing buyer" cannot buy unless there be a "willing seller" to sell for a price which he regards as fair value of the assets sold.

The principal issue on this appeal is defined in issue number 6 in the Pre-Trial order as follows:

> "Was there any *actual* profit realized by Graham-Paige within the comprehension, intent, meaning and purview of Section 16(b) by the sale of 155,000 shares of Kaiser-Frazer stock?"

To determine "actual" profit, "actual" cost must be sought—at least to the extent of ascertaining whether any profit resulted from the sale.

Where stock is acquired for property, tangible and intangible, the cost of the stock should be computed upon the value or worth of the assets delivered in exchange. The tangible assets are capable of fairly definite ascertainment. It is the intangible items which present the chief difficulty. That the latter were an

important part of the transaction is clearly supported by the proof. The directors of KF prior to approving the delivery of 750,000 shares to GP had considered the fact that GP "since September of 1945 had incurred a cost in excess of $8,000,000.00 in the development of the automobile business, building up a dealer and distributor organization and making the trade name 'Frazer' known to the public through a national advertising campaign," and "would derive the benefits from the 'going concern value' which had been built up by Graham-Paige Motors Corporation through the expenditure of this sum." In addition "Graham-Paige Motors Corporation had the right to use one-third of the capacity of the Willow Run Plant which right would be an extremely valuable one as soon as the production of automobiles was such as to enable the operators of the plant to make a profit." (Bd. of Dir. Min., Dec. 3, 1946, Ex. A.)

There was also testimony that the GP dealer and distributor organization acquired by KF had cost GP some three million dollars to set up and that it was actually worth substantially more; that large sums had been expended by GP on national advertising of which KF received the benefit; that patent rights were of value; and that the "going concern" value was worth many millions to KF.

The action taken by the KF directors in authorizing the issuance of the 750,000 shares is evidenced by their resolutions which were adopted after the Chairman pointed out that "the book value of the automotive assets of Graham-Paige Motors Corporation plus the working capital in the sum of $1,250,000 and other funds which would be made available to the Corporation exceeded by approximately $2,100,000 the principal amount of the outstanding 4% Convertible De-

bentures of Graham-Paige Motors Corporation. Consequently it might be said that the Corporation was issuing 750,000 shares of its common stock in exchange for $2,100,000.00 and the intangible assets of Graham-Paige Motors Corporation" (Ex. A, p. 3).

The KF Board resolved "That the fair value of the consideration to be received for said 750,000 shares of $1.00 par value capital stock of the Corporation upon the transfer of said automotive assets, and the payments and assignments set forth in the foregoing resolution, is the sum of $4,875,000.00" and "That in the judgment of the Board of Directors of the Corporation the money and property to be received by the Corporation for said 750,000 shares of stock is a fair and adequate consideration therefor, and is of a value at least equal to the value of said stock" (Ex. A).

Having evaluated the automotive assets and other funds at $2,100,000 in excess of the $8,524,000 obligation assumed to meet GP's outstanding debentures, a value of at least $2,775,000 had to be attributed to intangible items upon the hypothesis that the $4,875,000 figure in the resolution was calculated upon an $8 per share market value on December 3, 1946 and an assumed net realization of only $6.50 a share. On February 10, 1947 when the exchange was finally made the market price was 9⅝. Assuming a net of $8 a share, because of the increased market price and accepting approximately the same discount, the $4,875,000 figure would be $6,000,000.

Although the KF directors considered value from the viewpoint of the net figure which might be realized upon a public sale, it is by no means certain that this principle should apply to the determination of actual cost upon an exchange of assets. KF was not seeking to raise cash from the public by means of a stock of-

fering. Comparable value was the test rather than net realized after underwriters' discounts and charges. Therefore, the directors of KF might well have been justified in fixing a value closer to the actual market value. Were this discount ignored, the value of the intangibles would be even higher. Had the directors been faced with a price determination on February 10, 1947, they might well have fixed a price substantially in excess of $6.50 a share. There is no reason to believe that they would have been unmindful of their duty as directors to issue KF stock at fair value and not at a discount of over 33% of market value. Even a slight increase in value attributed by the KF directors on December 3, 1946 is sufficient to eliminate any profit upon the subsequent sale by GP of the 155,000 shares here involved.

The trial court following the directions of this court carefully analyzed the evidence to determine whether GP had satisfied its burden of proof that no profit was realized. He found as a result of certain assumptions and calculations that the cost of the 750,000 shares to GP was $11.08 a share and that instead of a profit a loss of $4.33 a share was suffered.

In our opinion it is unnecessary for purposes of decision here to adopt any particular theory of accounting or to make any assumptions as to specific items. The only question for decision is whether GP has established that the property exchanged was fairly worth at least $6.75 a share.

The purpose of the statute under which appellant seeks to recover should not be completely overlooked in the welter of evaluation hypotheses. The theory of section 16(b) of the Securities Exchange Act of 1934,

15 U. S. C. A. section 78p(b) is clearly stated in the Act:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. * * *"

The primary objective was to prevent "insiders" with advance information from engaging in short-swing speculation to their own advantage and to the disadvantage of outside stockholders.

Looking at the transaction objectively, KF made a commitment to sell 750,000 shares of its stock when the market was 8 and concluded the transaction on February 10, 1947 when the market price was 9⅜. The KF directors believed that the money and property received was "fair and adequate consideration therefor and is of a value at least equal to the value of said stock" (Ex. A). Just as the directors of KF were under a legal and moral duty to obtain full value for the KF stock issued so also was the management

of GP under a similar duty. The respective positions of the two companies made them a most willing buyer and an equally willing seller. GP received stock selling at 95/8 and sold it for 63/4, a loss of 27/8. Appellant asks this court to accept the hypothesis that on the day GP acquired the stock it was only worth $3.94 as against a market of 95/8. There is no basis whatsoever for any such conclusion.

Upon all the proof presented including market value of the KF stock, the worth of the so-called intangible assets (although good dealer and distributor organizations would appear to be highly tangible) built up at considerable expense to GP and the assumption by KF of the obligation to pay an amount equal to the principal and interest on the GP debentures, we believe that GP has sustained its burden of proof.

There remains for consideration appellant's argument that GP by its own figures and published statements has estopped itself against using any other cost figure than $3.94 a share. The fact that GP placed this figure on its books and even paid a profits tax based upon the difference between $3.94 and $6.75 per share the sale price of the 155,000 shares was the supporting reason for this court's previous declaration that appellant had made a prima facie case, thus shifting the burden to GP (232 F. 2d 299). Appellant points to representations in GP's proxy statement on the subject of assets to be transferred, a registration statement and prospectus in 1947, GP's 1947 annual report and its 1947 Federal income tax return, all as declaring a profit on the sale of the 155,000 shares.

This claim of estoppel was raised before Judge Dimock on the original hearing and rejected by him. Appellant then asserted this rejection as a ground

for reversal on his first appeal to this court. Although this court did not explicitly rule on the point, by necessary implication it held against appellant because, had it considered appellant's position to be sound, it would have been compelled to have directed entry of judgment for him and would not have remanded for the purpose of forcing GP to prove the very facts which appellant claimed GP was estopped from asserting.

Apart from this fact, appellant's point examined independently is lacking in merit. Appellant concedes that these statements could not create a collateral estoppel and that they did not create an estoppel *in pais*, or equitable estoppel, because neither KF nor its shareholders relied upon the statements. *Jelliffe v. Thaw*, 2 Cir., 1933, 67 F. 2d 880.

Appellant's theory is that the so-called doctrine of "judicial estoppel" concerning inconsistent statements made in prior litigation likewise encompasses extra-judicial statements made to governmental agencies, here the S. E. C. and Internal Revenue Service. Appellant then argues that the important federal policies embodied in the tax and securities laws dictate such a conclusion.

The doctrine of judicial estoppel, as urged here, would extend estoppel beyond all reasonable bounds. In finding facts in a law suit the business of the court is to determine the truth or falsity of the controverted propositions of fact. Collateral estoppel, or estoppel by judgment, was not developed to render immutable all statements or pronouncements of litigants but to protect the parties from the expense, delay, and harassment attendant upon having to prove *de novo* a fact already established in an action between the same parties or their privies.

The case of *Deitrick* v. *Greaney*, 309 U. S. 190, (1940), relied upon by appellant, is not in point. There the maker of a promissory note who procured its illegal issuance was precluded from raising the defense of illegality.[4] The court took pains to point out that estoppel was not the basis for striking the defense (309 U. S. 198).

Even if we were to accept—which we do not—the dictum that a party in a court proceeding could not assert a fact contrary to a prior assertion made before an administrative tribunal, appellant still could not prevail. In *Lewis* v. *Atlas Corp.*, 3 Cir., 1946, 158 F. 2d 599, 602, the prior inconsistent position was made to an S. E. C. examiner in the course of a hearing, i. e., a quasi-judicial proceeding. The statements here sought to be set up as estoppels were made in the regular course of business. The figures were reached as results of negotiations conducted by GP with the S. E. C. and the Revenue Service with the explicit realization by all concerned that the true cost of the shares was impossible to evaluate. Thus these opinions did not purport to be statements of demonstrable facts within the knowledge of GP, and were not made in any type of judicial proceeding. A party who is forced in the course of his business for practical reasons to make an estimate or to venture a guess is not forever precluded from reversing his estimate.

[4] The trial court recognized that "This willingness to pay tax on a profit attributable to the sale of stock seems inconsistent with Graham-Paige's present position" but found that a "study of the surrounding factors reveals that this apparent inconsistency is unreal." Thus, in computing profits on the sale of the Pacific shares of stock for tax purposes it might have been improper in evaluating the stock to include as part of the value of the stock i. e. its intangible assets, expenditures already deducted from gross income.

Nor is it necessary to decide whether or not profits might have been made on the sale of the assets. That question is not before us. The sole issue is whether there was a profit on the sale of stock within the purview of section 16(b). We believe that GT has sustained the burden of proof that there was no such profit and accordingly affirm the judgment below.

Judgment affirmed.

Waterman, J., concurs in the result.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the twenty-sixth day of September one thousand nine hundred and fifty-eight.

Present:

HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
HON. LEONARD P. MOORE,
Circuit Judges.

MICHAEL STELLA, suing on his own behalf and on behalf of all other stockholders of Kaiser-Frazer Corp. similarly situated,

Plaintiff-Appellant,

v.

GRAHAM-PAIGE MOTORS CORPORATION and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that this judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

G. DANIEL FUSARO,
Clerk.